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NO. 95-1352

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GARY EDWARDS and TANA WOOD,
Petitioners,

vs.

JERRY B. BALISOK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. __, 114 S.Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time?

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I. OPINIONS BELOW

The United States District Court for the Eastern District of Washington entered its Order Denying Defendants' Motion To Dismiss and Staying Action, and certified the case for immediate appeal. App. F. Following timely appeals by all parties, the United States Court of Appeals for the Ninth Circuit reversed and remanded. App. A. Both decisions are unreported.

II. JURISDICTION

The court of appeals entered its judgment on November 22, 1995. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS

28 U.S.C. § 2254(b)[1] provides: "An application

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[1]This statute was in effect until April 26, 1996 when it was amended as follows:

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> > "(A) the applicant has exhausted the remedies available in the courts of the State; of
> > "(B)(I) there is an absence of available State corrective process; or
> > "(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> "(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in

for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV. STATEMENT OF THE CASE

Respondent Jerry Balisok is an inmate in the custody of the Washington State Department of Corrections (DOC) pursuant to a 240 month sentence for attempted murder in the first degree. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Shortly after his conviction, Balisok transferred to the Washington State

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the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Ch. 153, § 104 (to be codified at 28 U.S.C. § 2254(b)).

Penitentiary (WSP), in Walla Walla, Washington. During his stay at WSP, Balisok became known by the United States District Court for the Eastern District as "an inmate who has filed numerous lawsuits . . . [and who] assists other inmates with their legal actions." App. F-3.

A. Balisok's State Prison Disciplinary Proceeding

Like all prisons within the DOC, officials at WSP enforce a prison disciplinary code, which sets forth a broad range of prison misconduct. Chapter 137-28 Washington Administrative Code (WAC). Violations of this code can result in a number of sanctions, including a loss of good-time credits.

In August 1993, prison officials notified Balisok that he had been charged with violations of the prison's disciplinary code. According to the infraction report, Balisok attempted to blackmail inmate Adams into lying about an innocent person. Balisok threatened to label Adams as an informant if he did not comply with Balisok's demand. App. K-1 to K-3.

On August 20, 1993, Balisok appeared at a prison disciplinary proceeding before Lt. Gary Edwards. Balisok denied that he was guilty of the rule violations, and claimed that Adams had set him up in order to avoid his own responsibility for stealing test answers. App. K-1 to K-3, L-1 to L-4. Balisok also complained that he was unable to present exculpatory evidence. App. K-2.

Edwards found Balisok guilty based upon documentation from an investigation, including a written report by a Custody Unit Supervisor. Edwards recommended that Balisok receive a sanction which included a loss of 30 days good-time credits. App. K-2 to K-3.

Balisok appealed the finding and sanction to WSP Superintendent Tana Wood. She rejected the appeal because it exceeded the 2-page limit, and imposed sanctions. Balisok then asked that his appeal be reconsidered. Wood responded by affirming the disciplinary finding and sanctions. App. H-5, F-3. Balisok did not challenge the disciplinary procedures or sanctions in state court.

B. Proceedings Below

On December 10, 1993, Balisok filed a civil rights complaint under 42 U.S.C. § 1983 alleging that Petitioners Edwards and Wood violated his due process rights at a prison disciplinary hearing which resulted in the loss of 30 days good-time credits. App. H. In his original complaint, Balisok alleged that Edwards failed to admit and consider exculpatory witness statements, and failed to provide a written report specifying the documents and testimony on which the disciplinary sanction was based. Balisok alleged that Wood violated his rights when she refused to reverse the disciplinary finding, remove the infractions from his record, and restore his good-time credits. App. H-4, H-7 to H-24, JA 3-8.

For relief, Balisok requested: (1) a declaratory judgment that the sanction of the loss of 30 days good-time credits deprived him of liberty without due process; (2) a declaratory judgment that Wood's refusal to reverse the disciplinary decision and remove the infractions violated his right to due process; (3) an injunction mandating removal of the infractions from his record and all residual effects stemming therefrom; and (4) compensatory and punitive damages in the amount of $80,000. App. H-24 to H-34.

On March 23, 1994, the prison officials moved to

stay the litigation pending Balisok's exhaustion of his habeas corpus remedies. The District Court stayed the motion to stay, anticipating this Court's decision in *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994). App. E. On June 24, 1994, this Court decided *Heck* and ruled habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring a § 1983 action for damages, if judgment for the prisoner would necessarily imply the invalidity of his conviction or sentence.

Following the *Heck* decision, the prison officials filed a motion to dismiss Balisok's complaint.[2] With his response to the motion, Balisok filed an amended complaint in which he dropped his claim for restoration of good-time credits. He refashioned his claim as one seeking relief from procedures, rather than relief from the result of the disciplinary proceeding. App. I.

Balisok alleged that the prison officials denied his presentation of witness statements in retaliation for being a jailhouse lawyer. App. I-6, I-7. His allegations expressly reserved the right to challenge the loss of good-time credits at a later date. App. F-4.

On February 6, 1995, the district court resolved the Defendants' motion to dismiss by entering a stay of proceedings and certifying the *Balisok* case for immediate appeal to the United States Court of Appeals for the Ninth Circuit. App. F-15. Even though Balisok dropped his claim for good-time credits, the district court concluded that his "due process claim is a challenge to his conviction

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[2]For the purpose of this motion Petitioners assumed that Balisok had a liberty interest in the good-time credits. That question is not raised in this case. It is raised in a companion petition for a writ of certiorari in *Wood v. Gotcher*, Supreme Court No. 95-1385, which is currently pending.

of an offense at the disciplinary proceeding, which would affect the length of his sentence." App. F-12. The district court reasoned that if "the disciplinary hearing at issue did violate [Balisok's] due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credits, were also unconstitutional and invalid." App. F-11.

The Ninth Circuit granted both parties' requests to appeal. On November 22, 1995, the Ninth Circuit summarily reversed and remanded, citing *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).[3] JA 9-10. The Ninth Circuit focused exclusively on the relief sought in Balisok's amended complaint. It did not analyze Balisok's claims to determine if they would call into question his loss of good-time credits.

Defendants filed a timely petition for writ of certiorari, which this Court granted on April 29, 1996.

V. SUMMARY OF ARGUMENT

In *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973), prisoners brought a § 1983 action that challenged the constitutionality of prison disciplinary proceedings, and specifically sought restoration of good-time credits. Applying principles of federal-state comity, this Court categorized the prisoner's claims as attacks on duration of confinement and required the prisoners to exhaust their habeas corpus remedies. In *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994), a prisoner brought a § 1983 action that challenged the prosecution of his criminal case, and specifically sought damages for the confinement that

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[3]The Ninth Circuit's opinion in *Gotcher* is included as Appendix M. The state defendants in *Gotcher v. Wood* seek review of this decision. *See* n.2, *supra* p. 5.

resulted from his conviction. Applying principles of tort law, this Court held that the § 1983 claim had not accrued because a judgment in favor of the prisoner would necessarily conflict with the valid conviction. In this case, Balisok brought a § 1983 action that challenged the constitutionality of a prison disciplinary hearing, and specifically sought restoration of lost good-time credits. Balisok later amended his complaint to delete the request for restoration of good-time credits. Balisok may not proceed under § 1983 for two independent reasons: (1) Balisok must first exhaust his habeas corpus remedies because the essence of his complaint is an attack on the duration of his confinement, and (2) Balisok's § 1983 action has not accrued because, if successful, it would necessarily conflict with his underlying sentence.

Under the principles of *Preiser*, Balisok's § 1983 action should be subject to the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a prison disciplinary hearing. Under this bright-line rule, Balisok cannot proceed with his § 1983 action because his claim could also support a claim for restoration of lost good-time credits. This bright-line rule must be applied for four reasons.

First, in deciding when to require exhaustion, this Court looks to the fundamental purposes from which the requirement is derived: federal-state comity. This Court has recognized the State's strong interest in the administration of its prisons and that federal courts should not be involved in the day to day management of state prisons. When a prisoner alleges that his good-time credits were taken without due process, the State must be given the first opportunity to pass upon the alleged violations and, if possible, correct the error.

Second, the purpose of due process at a prison disciplinary hearing is to prevent the arbitrary or unjustified denial of good-time credits. The need for exhaustion results from the nature of the particular substantive interests which Balisok claims were unlawfully taken -- his fundamental interests in liberty and freedom from unlawful custody. His procedural claims are inseparable from the liberty interest because, without a deprivation of liberty, he would have no procedural rights to enforce.

Third, the bright-line rule is necessary to prevent prisoners from intentionally or unwittingly evading the habeas corpus requirement. The Ninth Circuit's holding in this case, which looks only to the relief requested in a prisoner's pleading, either (1) rewards manipulative jailhouse lawyers, like Balisok, by allowing them to bypass exhaustion and attack their disciplinary hearing for the first time in a § 1983 action in federal court, or (2) punishes unsophisticated inmate plaintiffs whose inartful complaints ask for § 1983 relief, when habeas relief is the desired remedy.

Fourth, the bright-line rule provides a workable standard which district courts will be able to apply easily at the pleading stage. Fed. R. Civ. P. 12(b)(6) provides the district courts with a standard for determining whether a prisoner's complaint could state a claim for restoration of good-time credits.

Balisok's § 1983 challenge is also barred under the principles of tort law applied in *Heck*. When success in a § 1983 action would necessarily conflict with the plaintiff's underlying basis for confinement, the § 1983 claim will not accrue until the plaintiff eliminates the conflict by successfully exhausting habeas corpus remedies. Balisok's § 1983 claim has not accrued because his due process allegations, if proven, would necessarily require restoration of his good-time credits.

Whether Balisok's § 1983 claim is barred under the principles of habeas corpus or tort law, the result is consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Application of the bright-line rule in this case does not conflict with *Wolff* because *Wolff* involved a broad-based class action challenge to established and undisputed prison disciplinary procedures, as opposed to the isolated claim of an inmate attacking the constitutionality of a specific disciplinary hearing. The process of class certification allows the federal court to ensure that prisoners seeking prospective relief from unconstitutional disciplinary procedures are not merely attempting to evade the exhaustion requirement by labeling their pleadings in a certain way. Applying the tort principles of *Heck* to Balisok's case does not conflict with *Wolff* because, unlike the claims brought by Heck and Balisok, there was no reason to believe that the claims brought in *Wolff* would necessarily have invalidated a loss of good-time credits.

The Ninth Circuit should be reversed, and Balisok should be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

VI. ARGUMENT

A. Attacks On The Legality Or Duration of Confinement Must Be Resolved Through Habeas Corpus, Not § 1983.

This case involves "the interrelationship of two important federal laws": the federal habeas corpus statute, 28 U.S.C. § 2254, and the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973). These statutes provide a federal forum for claims of unconstitutional

treatment at the hands of the state, and are "the two most fertile sources of federal-court prisoner litigation". *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364, 2369 (1994). Under the principles of habeas corpus codified in § 2254, a prisoner must first exhaust state remedies before pursuing relief in the federal forum. The general rule for claims brought under § 1983 is that the prisoner need not exhaust state remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982).

In the area of prisoner litigation, these two statutes frequently overlap. As a result, federal courts are often faced with claims like those of Balisok which, although falling within the literal terms of § 1983, directly implicate the fact or duration of the plaintiff's confinement in a state prison.[4] The federal court must determine if such a claim is in "essence" a habeas corpus claim, which is defined as "an attack by a person in custody upon the legality of that custody". *Preiser*, 411 U.S. at 484. If the claim is categorized as an attack on the legality of custody, it is subject to the rule of exhaustion:

> "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." *Preiser*, 411 U.S. at 490.

Until the prisoner has exhausted his habeas corpus

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[4]Such claims have been referred to as "Preiser puzzles". Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 87, 88 (1988).

remedies, his or her claim will not be cognizable under § 1983. *Preiser*, 411 U.S at 488-490; *Heck*, 114 S. Ct. at 2369.

In *Preiser*, the prisoners specifically sought an injunction to restore good-time credits lost as a result of their hearing. This Court held that these claims were not cognizable under § 1983 until the prisoners exhausted their habeas corpus remedies. *Preiser*, 411 U.S. at 488-90. This Court based its decision on important principles of federal-state comity.

In *Heck*, this Court articulated a second basis for the conclusion that a prisoner cannot use § 1983 to attack the legality or duration of confinement. The prisoner in *Heck* sought damages based on the claim that his conviction was illegal. 114 S. Ct. at 2368 n.2. Applying principles of tort law, this Court held that such a claim for damages does not accrue unless the conviction has been invalidated and a conviction can only be attacked on direct appeal or through a habeas corpus action. *Heck*, 114 S. Ct. at 2372-73.

In *Preiser* the prisoners attacked the constitutionality of prison disciplinary proceedings and specifically sought restoration of good-time credits. In *Heck* the prisoner specifically sought damages for unlawful confinement resulting from his conviction. In this case, Balisok attacks the constitutionality of a prison disciplinary proceeding in which he lost good-time credits. Although he originally sought restoration of his good-time credits and other relief, Balisok amended his complaint to delete the request for the restoration of good-time credits. The question is whether Balisok can bring such a § 1983 claim.

The answer is no for two reasons. First, Balisok's claim is properly categorized as an attack on the length of his confinement. His claims by their very nature call into question the loss of good-time credits resulting from his

disciplinary hearing and, consequently, the length of his sentence. The principles of comity recognized by this court in *Preiser* call for application of the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a disciplinary hearing.

Second, the principles of tort law applied in *Heck* also apply here. As a result, Balisok's claim, if successful, will necessarily call into question his loss of good-time credits. Balisok's § 1983 claim will not accrue unless he successfully challenges his loss of good-time credits and this can only be done in a habeas corpus action.

These are independent grounds for requiring that Balisok's § 1983 claim be dismissed.

B. Balisok Must Exhaust His Habeas Corpus Remedies Under The Bright-Line Rule.

Based on the principles of *Preiser*, this Court should apply the following bright-line rule: exhaustion of state remedies should be required whenever the prisoner's allegations, no matter what relief is requested, could also support a claim for restoration of good-time credits lost at a prison disciplinary hearing. This bright-line rule is appropriate because it: (1) preserves the fundamental principles of federal-state comity which underlie exhaustion; (2) recognizes the primacy of the liberty interest which lies at the heart of a due process challenge; (3) allows a federal court, and not the unreliable pleadings of pro se inmates, to determine where jurisdiction over the claim lies; and (4) provides an easily applied solution to a jurisdictional problem that has puzzled district courts and litigants for years.

This case illustrates the propriety of the bright-line

rule. Balisok is attempting to bypass exhaustion by strategically amending the relief section of a complaint that attacks the prison disciplinary hearing where the duration of his confinement was extended. Although Balisok has temporarily dropped his claim for good-time credits, he has not altered the essence of his claim that state officials have unlawfully deprived him of good-time credits without due process of law. The bright-line rule properly categorizes Balisok's claim for what it is -- an attack on his duration of confinement. As such, his claim is not cognizable under § 1983.

1. Requiring Balisok To Exhaust Is Necessary To Preserve The Fundamental Purposes of Comity That Underlie The Exhaustion Requirement.

In deciding whether to require exhaustion, this Court looks to the fundamental purposes from which the requirement is derived. *Rose v. Lundy*, 455 U.S. 509, 517-519 (1982) (citations omitted); *Preiser*, 411 U.S. at 490-492. The exhaustion requirement is rooted in important considerations of federal-state comity that were found to be fundamental by this Court long before Congress codified it in 1948.[5] *Preiser*, 411 U.S. at 490-491; *Ex parte Royall*, 117 U.S. 241, 251 (1886); *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S 100 (1981), *quoting*

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[5]The enactment of § 2254(b) was simply designed to declare the common law rule of exhaustion which predated the original enactments of both § 1983 and § 2254. *Preiser*, 411 U.S. at 490-491; *Rose v. Lundy*, 455 U.S. 509, 515, n.8 (1982) (citations omitted). This Court should look to the policies of comity in order to define the proper scope and application of the exhaustion rule for § 1983 claims which relate to confinement. *Rose*, 455 U.S. at 517-519; *Preiser*, 411 U.S. at 490-492. *See also*, 42 U.S.C. § 1988, discussed *infra* p. 25.

Younger v. Harris, 401 U.S. 37, 44 (1971). Exhaustion avoids an unnecessary friction between state and federal courts over issues relating to a state prisoner's confinement by giving state courts the first opportunity to address any claims of unconstitutional confinement. *Preiser*, 411 U.S. at 490-492.

This Court has repeatedly reaffirmed in both habeas corpus and § 1983 cases a fundamental principle of comity: the day-to-day management of a state prison is best left to the state courts and state officials, and should only be subject to scrutiny by the federal judiciary in exceptional cases.[6] The exhaustion requirement should be applied in this case in order to preserve this fundamental principle.

In *Preiser*, this Court held that habeas corpus is the exclusive remedy for a state prisoner attacking the fact or duration of his confinement. *Preiser*, 411 U.S. at 490, 500. Like Balisok, the prisoners in *Preiser* brought a § 1983 challenge to the constitutionality of their prison disciplinary hearing. The prisoners tried to avoid the exhaustion requirement, arguing that the interests of comity that exist when a criminal conviction is challenged are not as weighty when the challenge is to a prison disciplinary hearing.

The Court rejected this argument, noting that the prisoners viewed the reasons for exhaustion "far too narrowly." *Preiser*, 411 U.S. at 491. This Court found the exhaustion requirement to be particularly important in cases where a prisoner challenges a prison disciplinary

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[6] *Preiser*, 411 U.S. at 491-492; See also *Casey v. Lewis*, ___ U.S. ___, 1996 WL 340797 (1996); *Sandin v. Conner*, 115 S. Ct. 2293, 2299 (1995); *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 456 (1985); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985); *Bell v. Wolfish*, 441 U.S. 520, 545-547 (1979); *Meachum v. Fano*, 427 U.S. 215, 228-229 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 562-563 (1974).

proceeding:

> "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser*, 411 U.S. at 491-492.

States have a fundamental interest in the administration of their prisons, and the internal problems of state prisons are peculiarly within state authority and expertise. *Preiser*, 411 U.S. at 492. State courts are more familiar with, and in a better physical and practical position to efficiently deal with, the day-to-day grievances of state prisoners. *Preiser*, 411 U.S. at 492.

For these reasons, *Preiser* held that states should be given the "first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492. When the state is given the first opportunity to correct such errors through its expedited habeas proceedings, it is in a better position to avoid both the injustice of an unlawful deprivation of good-time credits, as well as the resulting potential for civil rights liability.[7]

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[7] Doctrines of abstention provide additional support for the importance of exhaustion in this case. *See Colorado River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 812-814 (1976) (*citations omitted*); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Under *Pullman*, abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 812 (1976) (*citations omitted*). If given the opportunity, a Washington Court could provide a state post-deprivation remedy to Balisok that would make any federal ruling on the constitutional issues unnecessary. The fact that

The State of Washington "has no interest" in subjecting an individual to confinement without affording minimal procedural guarantees. *Morrissey v. Brewer*, 408 U.S. 471, 495 (1972). If a prisoner alleges that these guarantees were not met, the State has a fundamental interest to ensure that the prisoner is not subject to confinement without reason. The mere fact that the prisoner currently seeks truncated relief from procedures under § 1983 does not eliminate the State's interest in ensuring that those within its custody are not there for an unlawful length of time.[8] The decision to confine a prisoner is a matter of state law, and not a matter of the prisoner's own volition.

This first opportunity to correct alleged due process errors is especially important when the ultimate question of due process turns on whether the state has "created" a liberty interest in good-time credits. Determining the existence of a state created liberty interest requires a review not just of a specific prison hearing, but the entire state disciplinary system itself. *Sandin v. Conner*, 115 S.

Balisok cannot immediately seek relief under § 1983, "does not mean that the state [post-deprivation] remedies are not adequate to satisfy the requirements of due process." *Parratt v. Taylor*, 541 U.S. 527, 544 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *see also Nelson v. Murphy*, 44 F.3d 497, 502-503 (7th Cir. 1995); *Offet v. Solem*, 823 F.2d 1256, 1262-63 (8th Cir. 1984)(Arnold, J., dissenting) (discussing the appropriateness of abstention in prisoner cases).

[8]Requiring exhaustion will not unduly delay the prisoner's ability to seek additional relief under § 1983. This Court has recognized that state courts act expeditiously to resolve such challenges, whereas civil rights actions can take "a significant amount of time". *Preiser*, 411 U.S. at 494-496.

Ct. 2293, 2301-02 (1995). It is difficult to imagine any question where the State's interest and expertise in an initial review would be stronger.[9]

The bright-line rule -- that exhaustion is required if the allegations "would state a claim" for restoration of good-time credits -- is necessary to preserve the principles of federal-state comity that are important in the area of prisoner discipline.

2. The Purpose Of Due Process At A Prison Disciplinary Hearing Is To Prevent The Arbitrary Or Unjustified Denial Of Good-Time Credits.

The bright-line rule also recognizes that the primary interest that due process serves to protect is the freedom from unlawful state confinement. Balisok's claim must be exhausted because, despite the relief currently sought, the essence of the claim is an attack on the accuracy of a disciplinary sanction imposed by state prison officials.

The fact that Balisok seeks relief from procedures rather than the resulting loss of good-time credits does not alter the essence of his due process claim. By their very nature, procedural due process claims are attacks on the result of a proceeding which has adversely affected a substantive constitutional interest of the plaintiff. Although a plaintiff may, in an exceptional case, be able to demonstrate compensable injury from a procedure, the right to the procedure should not be elevated to a level above the substantive constitutional interest that it protects.

Rules governing relief for constitutional deprivations are tailored to the interest protected by the particular right in question. *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

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[9]*See* n.2, *supra*, p. 5.

> "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254.

Due process exists to protect the individual's interest in avoiding "the mistaken unjustified deprivation of life, liberty, or property". *Carey*, 435 U.S. at 259. See Tribe, American Constitutional Law § 10-7, pp. 666-677 (2d Ed. 1988). Rather than an end in itself, due process is an instrument to ensure that the state does not mistakenly or unjustifiably deprive a person of a substantive interest. This "instrumental" purpose of procedural due process is not designed to secure the individual's participation in a "process" for the sake of process. The purpose of due process "is less to assure **participation** than to use participation to assure **accuracy**" in the outcome of the process. Tribe, at 666-667 and 671 (emphasis in original).

The need for exhaustion results from the nature of the particular interests which Balisok claims were unlawfully taken -- his fundamental interests in liberty and freedom from unlawful state custody. The essence of Balisok's claim is that prison officials have unconstitutionally deprived him of a liberty interest in good-time credits without procedural due process. Balisok's claim is inextricable from the substantive interest in liberty that lies at the heart of a due process claim.

The essence of Balisok's claims are underscored by the remedy afforded when challenges to prison disciplinary hearings are successful. Both federal courts and state courts will reverse the decisions and sanctions of prison disciplinary officers where the prisoner is denied an opportunity to prevent exculpatory evidence. *See, e.g.*,

Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2nd Cir. 1991) (sanction could not stand due to arbitrary denial of witnesses); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980) (expungement required where "defects in the procedures . . . significantly affected Hayes ability to demonstrate his innocence"); *Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991) ("An unjustified refusal to permit live testimony of a defense witness . . . will warrant reversal"). In contrast, courts have rarely, if ever, provided a prisoner with nominal, let alone compensatory, damages resulting from a prison procedure itself.

It is ironic, in light of *Sandin*, that in order to proceed in federal court, Balisok attempts to disclaim his interest in the "atypical and significant deprivation" that is necessary to enable him to raise the claim in the first place. If Balisok had not lost good-time credits at his hearing, he would be unable to bring any due process claim, no matter how outrageous or harmful the procedural violation for without deprivation of a liberty interest, he would have no due process rights.

3. The Bright-Line Rule Is Necessary To Prevent Prisoners From Intentionally Or Unwittingly Evading Habeas Exhaustion.

The Ninth Circuit's holding in *Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995); App. A-7, gives prisoners, rather than courts, the power to decide questions of federal court jurisdiction. Under this holding, prisoners need not exhaust state habeas remedies as long as they can craft a § 1983 complaint containing a "claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits)." *Id. quoting Heck*, 114 S.Ct. at 2370. This holding leads to results that are at odds with the exhaustion requirement and the principle of

Preiser that prisoners not be allowed to mislabel their pleadings in order to circumvent exhaustion. *Preiser*, 411 U.S. at 489-490.

As a corollary to the exhaustion requirement, *Preiser* established the principle that prisoners must not be allowed to manipulate their pleadings in an effort to deprive the states of their "first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492. In *Heck*, the Court similarly directed district courts to consider the potential substantive outcome of a favorable judgment for the prisoner, not the label on the pleadings.[10] *Heck*, 114 S. Ct. at 2372. Mindful of the incentive for prisoners to attempt to circumvent the exhaustion requirement, *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleadings." *Preiser*, 411 U.S. at 489-90.[11] The incentive for circumvention is even greater today, in light of the new stringent standards for review of habeas

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[10]This Court emphasized that the district court bears the responsibility to analyze the implications of a § 1983 suit in relation to the fact or duration of the prisoner's confinement. *Heck*, 114 S. Ct. at 2372. That federal jurisdiction cannot be established by an allegation that is "made solely for the purpose of obtaining jurisdiction". *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 279 (1977), *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946).

[11]The Second Circuit, in its decision in *Preiser* before review was granted by this Court, recognized that "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of the [habeas corpus statute]." *Rodriguez v. McGinnis*, 451 F.2d 730, 731 (2d Cir. 1971). *See also Rodriguez v. McGinnis*, 456 F.2d 79, 84 (2d Cir. 1972) (en banc) (Mansfield, J., concurring) ("state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes".). *See e.g., Greene v. Meese*, 875 F.2d 639, 641-42 (7th Cir. 1989); *Del Raine v. Carlson*, 826 F.2d 698, 703 (7th Cir. 1987).

claims in federal court.[12]

Dismissal is appropriate for Balisok's § 1983 complaint because Balisok's manipulation of the pleadings is apparent and his claim is not cognizable. Before strategically amending the complaint, Balisok explicitly sought restoration of good-time credits. App. H-32. The fact that Balisok altered the relief section of his pleading does not alter the essence of his claim. This abuse of § 1983 jurisdiction is stopped by the bright-line rule requiring exhaustion of all challenges to prison disciplinary proceedings where the complaint would also state a claim for restoration of the lost good-time credits. Without this bright-line rule, it will be easy for prisoners to defeat the

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[12]The new standard of review for federal habeas corpus is:

> "(d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Ch. 153, § 104 (to be codified at 28 U.S.C. § 2254(d))

fundamental purposes of exhaustion.[13] *See* Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21, 36 (1994).

In contrast to the reward given to manipulative *pro se* inmates, the Ninth Circuit's holding in *Gotcher* causes an injustice for prisoners who do not intend to circumvent exhaustion. Under this holding, unsophisticated pro se litigants who may logically seek an earlier release from confinement, will instead languish in civil rights actions merely because they failed to clearly specify their claim for freedom from an unlawful confinement. *See* Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 125-26 (1988).

The Ninth Circuit's focus on the relief sought in the pleading can sidetrack *pro se* prisoners along the lengthy path of discovery and pre-trial proceedings of a § 1983 action, and does not accommodate the prisoner's interest in speedy relief from unlawful confinement. Rather than obtaining the relief prisoners logically seek (release from confinement), prisoners run the significant risk of serving lengthened sentences before their civil action can be resolved, thereby forever losing their right to early release from unlawful confinement.[14]

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[13]The threat of circumvention is not unique to jailhouse lawyers. A real potential exists that attorneys will also seek to circumvent habeas corpus remedies because attorney's fees under § 1988 are available for § 1983 claims, and are not available for habeas corpus claims.

[14]For example in *Gotcher*, the inmate filed a civil rights action in which he claimed that "his loss of good conduct time credits and placement in disciplinary segregation constituted compensable violations of his due process rights", and sought unspecified injunctive relief. *See* App. M-5 (emphasis supplied). Despite his claim that the loss of good-time credits resulted in compensable injury, the Ninth Circuit focused on the label of Gotcher's pleading and failed to direct

Unlike the Ninth Circuit's *Gotcher* holding, the bright-line rule gives appropriate treatment to both sophisticated and unsophisticated *pro se* prison litigators. The requirement that prisoners first exhaust challenges that would state a claim for restoration of good-time credits provides a standard that will eliminate the troubling grey area between habeas corpus and civil rights proceedings, and prevent inmates from intentionally or unwittingly circumventing the exhaustion requirement.

The bright-line rule will ensure that either a state or federal court will be in a position to restore good-time credits pursuant to the expedited procedures of habeas corpus. Like other states, Washington provides its prisoners with a clear expedited remedy for challenges to prison disciplinary proceedings resulting in a loss of good-time credits. Washington Rules of Appellate Procedure 16.9 and 16.11. The expedited nature of state and federal habeas relief diminishes any argument by Balisok that he will be prejudiced by the delay of first pursuing habeas relief.

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exhaustion of habeas remedies. By pursuing his claims under § 1983, Gotcher experienced substantial delay in his efforts to resolve his claim. After filing his complaint, Gotcher was forced to wait two years before the Ninth Circuit issued the decision remanding the case for a review on the merits. By that time, Gotcher had already been released from prison. *See* Respondent's Brief in Opposition, at p. 4, *Wood v. Gotcher*, Supreme Court No. 95-1385. Having served his extended sentence, Gotcher forever lost his ability to seek restoration of the good-time credits, and the State is exposed to greater liability because its courts were not given any opportunity to expedite his release based upon the errors alleged in his "civil rights" lawsuit.

4. The Bright Line Rule Will Be Sensibly And Easily Applied By District Courts.

The bright-line rule requiring exhaustion of complaints that would state a claim for restoration of good-time credits provides an easy, workable standard for district courts to apply at the pleading stage, without resort to fact-bound inquiries. The bright-line rule is consistent with the principles that have guided the federal courts in review of pleadings under Fed. R. Civ. P. 12(b)(6) and 42 U.S.C. § 1988.

Federal courts are well versed in reviewing prisoner complaints under Fed. R. Civ. P. 12(b)(6) to determine whether the allegations support a claim for constitutional relief. A claim should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Federal courts are not limited by the relief expressly sought in the complaint. Federal rules provide that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in the party's pleadings**." Fed. R. Civ. P. 54(d) (emphasis supplied).

With these standards, district courts can easily apply the bright-line rule to determine whether a prisoner's allegations would support a claim for restoration of good-time credits. The bright-line rule can be applied without focusing on relief currently sought, and without the need to resolve troublesome "fact-bound issue[s]" such as whether the claim would necessarily invalidate the result of the hearing, or whether the inmate is deliberately manipulating his pleadings. *Heck*, 114 S. Ct. at 2368-69 n.2.

By liberally construing the complaint in favor of habeas relief, a district court will ensure that inmates do not circumvent exhaustion with self-defeating allegations that they seek a federal forum to litigate claims for nominal and declaratory relief from purely procedural error. In addition, pro se inmates who act in good faith will be channelled towards the proceedings where they can best seek expedited and effective relief.

42 U.S.C. § 1988, also supports application of the bright-line rule to prisoner complaints. Under this statute, jurisdiction in civil rights actions must be exercised in a manner that is consistent with other federal statutes, to the extent that those statutes are also "suitable" to effectuate the purposes of § 1983. In relevant part, § 1988 provides that:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provision of this Title, and of Title "CIVIL RIGHTS" . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . ." 42 U.S.C. § 1988.

This statute provides additional authority for federal courts to define the principles of exhaustion that should apply when a prisoner attempts to bring a § 1983 claim that implicates the lawfulness of confinement.[15] 42 U.S.C. §

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[15]When federal law is deficient in its ability to provide a suitable remedy, 42 U.S.C. § 1988 requires the federal courts to extend the common law. *See* § 1988, *Carey*, 435 U.S. at 258 n. 13. Because the

1988; *see also* 28 U.S.C. § 1651. This statute supports the conclusion that Balisok's § 1983 claim is not cognizable until he has first resolved its direct ramifications for his loss of good-time credits. Under § 1988, federal court jurisdiction must be exercised in conformity with § 2254. The civil rights statutes should be read against the background of habeas law which gives the states an opportunity to correct errors which may have resulted in unlawful confinement.

By requiring Balisok to seek habeas relief pursuant to § 2254, the district court will provide the most "suitable" solution for the "protection" and "vindication" of Balisok's civil right to due process, which exists to prevent the unlawful extension of a prisoner's confinement. Because this case involves a loss of liberty, the law of the United States that is most suitable is the exhaustion requirement. The exhaustion requirement effectuates the primary purpose of § 1983 -- vindication of constitutional rights and is easily applied by the district courts.

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federal law of habeas corpus is not deficient, and does not displace the remedies of § 1983, extension of the common law is not necessary. An extension of common law would only be appropriate when, as in *Heck*, the extension is "not inconsistent with the Constitution and laws of the United States", 42 U.S.C. § 1988, including the requirement that a prisoner first exhaust a claim which attacks his duration of confinement.

C. Under Tort Law Principles, Balisok's § 1983 Claim Will Not Accrue Unless He First Prevails In A Habeas Corpus Action.

Principles of tort law provide a second and independent basis for barring Balisok's § 1983 action.[16] In *Heck*, this Court utilized principles of tort law to determine whether a § 1983 cause of action accrued. *Heck v. Humphrey*, 114 S. Ct. at 2370-72.

Heck sought damages under the premise that he was unlawfully convicted when state prosecutors "knowingly destroyed" evidence which was "exculpatory", and took other arbitrary actions during the prosecution of his case. *Heck*, 114 S. Ct. at 2368. Because success on these damages claims would necessarily demonstrate that Heck's confinement was unlawful, the Court subjected Heck's claim to the tort rule that such civil actions will not accrue until the plaintiff has obtained a "favorable termination" of the underlying criminal proceeding.[17] *Heck*, 114 S. Ct.

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[16]In *Monroe v. Pape*, Justice Douglas concluded that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Since that time, the Court has described § 1983 as a "species of tort liability". *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986). Notwithstanding the foregoing, the task of adapting common-law tort rules of damages to actions for the deprivation of a constitutional right is one "of some delicacy." *Stachura*, 477 U.S. at 309, n. 13, *quoting Carey v. Piphus*, 435 U.S. at 258. Although § 1983 may create a species of tort liability, it should not be considered "a font of tort law". *Paul v. Davis*, 424 U.S. 693, 700-701 (1976). Tort rules of damages will not always provide a "complete solution" to every constitutional question. *Carey*, 435 U.S. at 258.

[17]In refusing to focus on the relief sought by Heck, this Court specifically rejected *dicta* in *Preiser* which suggested that prisoners might be able to pursue a civil rights claim for damages rather than

at 2371-72.

This favorable termination rule is based upon the strong judicial policy against conflicting resolutions arising from the same transaction.[18] *Heck*, 114 S. Ct. at 2371, *citing* 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, p. 24 (1991). When a § 1983 complaint is based upon allegations of unlawful action which would necessarily render the plaintiff's conviction or sentence invalid, the conflict is apparent and the § 1983 action will not accrue until the underlying basis for confinement is "declared invalid by the state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus".[19] *Heck*, 114 S. Ct. at 2372.

The tort principles that barred Heck's challenge to a conviction would also prevent accrual of § 1983 challenges to prison disciplinary proceedings. Although prison disciplinary proceedings are administrative and not criminal, the principles relied upon in *Heck* extend to administrative proceedings, which are properly subject to the same rules and limitations, including the rule of

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injunctive relief. According to this Court, this dicta was "an unreliable, if not an unintelligible, guide". *Heck*, 114 S. Ct. at 2370.

[18]This policy is also consistent with this Court's abstention doctrines. *See* n.7, *supra* p. 15.

[19]The Court also indicated that § 1983 claims which would not necessarily invalidate a sentence or conviction may proceed if the federal court "determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff". *Heck*, 114 S. Ct. at 2372 (emphasis in original). The bright-line rule is consistent with this conclusion. If a district court can determine in advance that success will have no effect on the prisoner's sentence, then the plaintiff's complaint clearly will not support a claim for restoration of good-time credits, making exhaustion unnecessary.

favorable termination. *Miller v. Indiana Dept. of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996); *see* Prosser and Keeton on Law of Torts, § 120, pp. 891-893 (5th Ed. 1984).

Balisok's § 1983 claim falls under the favorable termination rule of *Heck* because, if successful, his challenge will necessarily call into question his loss of good-time credits. Much like Heck, Balisok claimed that state officials knowingly deprived him of the opportunity to present exculpatory evidence in his defense. App. I-4 to I-6; *see also* App. H-7 to H-14, and H-17 to H-18. In his original complaint, Balisok specifically sought restoration of good-time credits. App. H-31 to H-32. In his witness list, Balisok summarized testimony which, if believed, would exonerate him from guilt. Balisok was asserting he was innocent, which would necessarily invalidate his sanction and restore his good-time credits.

The amended complaint abandoned the request for good-time credits and sought relief in the form of a declaration that the procedures employed violated his right to due process, an injunction to prevent future violations, and compensatory and punitive damages for the "harm sustained from the use of unconstitutional procedures." App. I-9 to I-10. At the same time, Balisok explicitly reserved the right to challenge the loss of good-time credits at another time. App. F-4.

Despite Balisok's careful amendments, the district court recognized the nature of the alleged procedural violations, if proven, would necessarily invalidate the resulting loss of good-time credits.

> "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid." App. F-11.

Far more than procedural technicalities, Balisok alleges clear and serious violations of *Wolff*'s minimal due process protections. Specifically, he alleges a practice by prison officials designed to frustrate the ability of jailhouse lawyers to present exculpatory evidence through witness statements.[20] App. I-4; *see Wolff*, 418 U.S. at 566 ("the inmate facing disciplinary hearings should be allowed to call witnesses and present documentary evidence in his defense . . ."). Such a practice, if proven, would require the restoration of Balisok's good-time credits.

The federal courts will restore lost good-time credits if the asserted due process violation is indicative of arbitrary action by the prison hearing officer, or substantially interferes with the prisoner's ability to present exculpatory evidence.[21] *See Kingsley v. Bureau of*

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[20]Balisok describes the alleged unconstitutional practice as follows:

> "The prison officials at the correctional institution do not date stamp witness statements which are made in reference to a 'jail house attorney.' . . . The prison officials do not stamp the statement so that in the event of a due process challenge for failure to call witnesses, a prison official may counter the challenge by saying the witness report was not submitted or was submitted late." App. I-4.

[21]Nor would Balisok's claims be subject to harmless error analysis. Under *Elkin v. Fauver*, harmless error will not be available if the procedural error is indicative of a pattern or practice of unlawful procedures. *Elkin v. Fauver*, 969 F.2d 48, 53 (3rd Cir. 1992) ("In the absence of a recent pattern of violations, it is entirely inappropriate to overturn the outcome of a prison disciplinary proceeding because of a procedural error without making the normal appellate assessment as to whether the error was harmless or prejudicial."); *accord Hayes*, *supra*. Balisok alleged that his inability to present exculpatory evidence at the disciplinary hearing was part of a recent pattern of violations by prison officials. *See* n.20, *supra* p. 30.

Prisons, 937 F.2d 26, 31 (2nd Cir. 1991) (sanction could not stand due to arbitrary denial of witnesses); *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980) (expungement required where "defects in the procedures . . . significantly affected Hayes' ability to demonstrate his innocence").

State law requires the same result. Much like a federal court, Washington courts require prison officials to provide prisoners with an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals. *In re Burton*, 80 Wn. App. 573, 585, 910 P.2d ___, *review denied*, ___ Wn.2d ___ (1996).

A Washington appellate court would reverse the decision and sanctions of a state disciplinary hearing officer if confronted with the arbitrary procedural violations alleged by Balisok:

> "[E]ven lofty goals cannot excuse the entire lack of due process and the arbitrary manner in which these hearings were conducted with the resultant punishments. The findings and sanctions imposed against each petitioner must be set aside."

In re Hunter, 43 Wn. App. 174, 177, 715 P.2d 1146 (1986); *see also In re Reismiller*, 101 Wn.2d 291, 298, 678

P.2d 323 (1984) ("Thus, the committee's finding is reversed and the cause remanded with directions that the superintendent grant a new disciplinary hearing consistent with the requirements of this opinion.").[22]

Balisok's allegations, if established, would necessarily invalidate the result of his prison disciplinary hearing. As a result, his claim is properly analogized to the tort of malicious prosecution, under which a civil claim will not accrue until the plaintiff receives a favorable termination in a state or federal habeas corpus proceeding.

D. Requiring Balisok's § 1983 Claim To Be Dismissed Is Not Inconsistent With *Wolff v. McDonnell.*

Neither the application of the bright-line rule requiring exhaustion nor the application of the favorable termination requirement in *Heck* are inconsistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974).

First, application of the bright-line rule requiring exhaustion is not inconsistent with *Wolff* in this case because *Wolff* involved a court-certified class action containing broad-based challenges to established and undisputed procedures of the Nebraska corrections system. The claims in *Wolff* were allowed to proceed without exhaustion after a class action had been certified. Not all members of the prisoner class lost good-time credits. As a result, there were plaintiffs who were entitled to seek

[22]Other states will also reverse prison disciplinary proceedings for prison officials' failure to follow the standards discussed in *Wolff*. *See, e.g., People v. Superior Court*, 230 Cal. App. 3d 1592, 1595, 281 Cal. Rptr. 900, 902 (1991); (regarding the sufficient impartiality of the hearing officer); *Dumas v. State*, 654 So.2d 48, 49 (Ala. 1994) (reversal of prison disciplinary hearing where inmate was not afforded a qualified right to call witnesses).

review under § 1983 because their claims would not support a claim for lost good-time credits of a prior hearing. Thus, *Wolff*'s result is perfectly consistent with a rule of exhaustion that would bar an individual plaintiff from bringing a § 1983 action even though he or she has dropped (or momentarily failed to plead) a viable claim for restoration of good-time credits.

Wolff's distinguishing features were present in other cases where this Court allowed review under § 1983 without requiring exhaustion. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (class action § 1983 challenge to undisputed Florida procedures under which persons are detained under a prosecutor's information without any opportunity for a probable cause determination); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) (class action § 1983 challenge to undisputed Nebraska procedures under which prisoners are denied release on parole).

Circuit courts have required exhaustion of claims that were similar to Balisok's claim, recognizing the distinguishing features of *Wolff*. *Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116, 1118-19 (5th Cir. 1987) (concluding that *Wolff* must be read in light of its "immediate implications ... to broad-based class action challenges" on general rules and procedures) *citing Alexander v. Ware*, 714 F.2d 416 (5th Cir. 1983); *Offet v. Solem*, 823 F.2d 1256, 1260 (8th Cir. 1987) (distinguishing *Wolff* as a case where the relief provided was "entirely prospective in nature", and was not intended to effect "review of the state's prior disciplinary decisions").

Further, through the process of class certification, the district court may exercise discretion and ensure that the prisoners seeking prospective relief from allegedly unconstitutional disciplinary procedures are not merely

attempting to evade exhaustion by labeling their pleadings in a certain way. *See generally O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States Parole Com'n v. Geraghty*, 445 U.S. 388 (1980); *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (discussing the basic thresholds for class certification in § 1983 actions). This threshold eliminates the incentive for prisoners to allege anything, including a broad-based procedural violation, in order to by-pass exhaustion and obtain immediate federal review of a specific state prison disciplinary hearing.

Balisok is a lone litigant challenging the constitutionality of a specific disciplinary proceeding. Until his claim is subsumed within the context of a certified class action, he must exhaust his habeas corpus remedies before proceeding on a prospective challenge to the prison disciplinary procedures which have extended his confinement.

Second, in this case, application of *Heck*'s favorable termination requirement is not inconsistent with *Wolff*. In *Heck*, this Court barred Heck's damages claim because he had not obtained a favorable termination with respect to his underlying basis of confinement. This Court distinguished *Wolff* as a case where there was not "any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits." *Heck*, 114 S. Ct. at 2370. The same distinction holds true here. As in *Heck*, the serious procedural violations alleged by Balisok would necessarily vitiate the denial of Balisok's good-time credits. *See* argument C, *infra*, p. 27. Under principles of tort law, Balisok must successfully exhaust habeas corpus remedies before his § 1983 claim will even accrue.

Two independent grounds support dismissal of Balisok's § 1983 claim. Neither is inconsistent with *Wolff*.

VII. CONCLUSION

The Petitioners respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be reversed, and that Respondent Balisok be required to successfully exhaust his habeas corpus remedies before proceeding against state prison officials under § 1983.

RESPECTFULLY SUBMITTED

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